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No. 87-1564

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES,
Petitioner,

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER

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TABLE OF AUTHORITIES

CASES: Page

Bell v. *New Jersey*, 461 U.S. 773 (1983) 2
Bennett v. *Kentucky Department of Education*, 470 U.S. 656 (1985) 2
Bowen v. *Massachusetts*, No. 87-712 (argued April 20, 1988) 4
Massachusetts v. *Bowen*, No. 87-929 (argued April 20, 1988) 4
Pennhurst State School & Hospital v. *Halderman*, 451 U.S. 1 (1981) 3

STATUTES AND REGULATIONS:

42 U.S.C. § 608(f) (1976) 3
45 C.F.R. § 95.511 (1987) 2

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REPLY BRIEF FOR PETITIONER

I

Petitioner submits that this Court should grant certiorari to decide whether the Department of Health and Human Services can retroactively apply its 1981 interpretation of an ambiguous statute to require petitioner to repay $66 million that the Department had disbursed to the State pursuant to the Department's 1977 interpretation of the statute. Respondents assert that this case does not present any issue of retroactive application because, in respondents' view, the 1977 interpretation was not sufficiently formal to constitute an official interpretation by the agency itself. Conspicuously absent from respondents' argument is any discussion of the fact that the 1977 interpretation was the predicate for official agency action —particularly the formal approval of the State's cost

allocation plan by the agency official designated by regulation to approve such plans.

Agency regulations make the Director of the Regional Division of Cost Allocation responsible for approving or disapproving cost allocation plans submitted by the states. 45 C.F.R. § 95.511 (1987). At the suggestion of regional officials (C.A. App. 92), New York in 1977 submitted a cost allocation plan that provided for the transfer of the costs of caseworker activities associated with the AFDC foster care program to Title IV-A. The Director of the Division of Cost Allocation in Region II approved this plan. (C.A. App. 92-93.) Since this official was exercising authority that had been delegated to him from the Secretary by regulation, his decision constituted formal agency action on which New York could reasonably rely.

Similarly, the agency's continuing acceptance of the State's claims for federal funds for some two years based on the 1977 interpretation represented further formal action by authorized officials that implemented that interpretation.

Thus, this case does squarely present the issue of whether the Department can retroactively apply its contrary 1981 interpretation to require repayment of the substantial funds that were disbursed to the State pursuant to the 1977 decision. Contrary to respondents' protestations, it is clear that the Department "is attempting to enforce the second of two inconsistent administrative interpretations of a grant statute." (Br. in Op. at 9.) This case therefore clearly presents the issue left open by the Court in *Bennett* v. *Kentucky Department of Education*, 470 U.S. 656, 670 (1985), and identified as "significant" in Justice White's concurring opinion in *Bell* v. *New Jersey*, 461 U.S. 773, 794 (1983).

II

In attempting to distinguish this case from the issue identified in Justice White's concurrence, and from the

Court's ruling in *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981), respondents assert that HHS has not "retroactively increased or otherwise altered the substantive standards that petitioner was required to meet in order to be eligible for AFDC grants," and that "[t]he issue in this case involves not the obligation of a State to provide services, but rather the obligation of the federal government to bear part of the cost of those services." (Br. in Opp. at 10-11.) This exercise in semantics only confuses what is at issue here.

In order to qualify for federal grants to pay a portion of its maintenance payments to needy foster children, the State was required to provide caseworkers to assist in the placement of the children and the development of a plan for their proper care and the improvement of conditions in the home from which they were removed. 42 U.S.C. § 608(f) (1976). The question presented by the 1975 amendment to the statute was whether these caseworker activities would continue to be subsidized under the open-ended provisions of Title IV-A or under the capped provisions of the newly-enacted Title XX. In either event, the State was required to provide these services in order to qualify for grants to foster children. By retroactively applying the 1981 interpretation to recover funds disbursed to New York pursuant to the 1977 interpretation, the Department made compliance with the obligations required for participation in the AFDC-FC program more costly than the State had been led to believe by the 1977 approval of its cost allocation plan. Whether a federal agency may retroactively change the conditions for participation in a federal grant program in this manner is precisely the issue left open by the Court's opinion in *Bennett* v. *Kentucky Department of Education* and by Justice White in *Bell* v. *New Jersey*.

III

We are at a loss to understand why respondents suggest that petitioner should have raised "any jurisdictional issues in the petition." (Br. in Opp. at 16.) As respondents recognize, the Secretary did not contest the jurisdiction of the district court and the court of appeals. Since it is the Secretary that has failed to preserve his argument that the courts below lacked jurisdiction, the present posture of this case should remain unaffected by the outcome in *Bowen* v. *Massachusetts*, No. 87-712 and *Massachusetts* v. *Bowen*, No. 87-929 (argued April 20, 1988).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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